PUBLIC VERSION

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September 6, 2018

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Petition for Further Reconsideration, *AT&T Corp. v. Iowa Network Services, Inc.*, Proceeding No. 17-56, File No. EB-17-MD-001**

Dear Ms. Dortch:

Through this errata, AT&T Corp. ("AT&T") adds the following highlighted language that was inadvertently omitted from the first full paragraph on page 13 to AT&T's Petition for Further Reconsideration, which AT&T filed on August 31, 2018:

> For all of these reasons, in holding that the 2012 rate would apply in lieu of a tariff not deemed lawful (and absent a finding of furtive concealment), the Commission prematurely and improperly prevented AT&T from establishing the "full amount of damages" for which, under the Act, a common carrier like Aureon "shall be liable" when it violates the Act.

An amended version of AT&T's Petition is attached hereto, along with the previously submitted transmittal letter.

Sincerely,

_/s/ Michael Hunseder_____

Michael Hunseder
Counsel to AT&T

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

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August 31, 2018

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Petition for Further Reconsideration, *AT&T Corp. v. Iowa Network Services, Inc.*, Proceeding Number No. 17-56; File No. EB-17-MD-001**

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits for filing the **Public Version** of its Petition for Further Reconsideration in the above-referenced proceeding. Consistent with the Commission's rules and the February 24, 2017 Protective Order entered by the Commission Staff, AT&T has redacted all highly confidential information from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary's office hard copies of the **Highly Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically on Aureon's counsel. Electronic courtesy copies, as well as three courtesy hard copies of the Highly Confidential Version, are also being provided to the Commission's Enforcement Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,

James F. Bendernagel

Enclosures

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

SIDLEY

cc: James L. Troup, Counsel for Defendant
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PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **AT&T CORP.** ***Complainant,*** ***v.*** **IOWA NETWORK SERVICES, INC.** ***Defendant.***	**Proceeding Number 17-56** **File No. EB-17-MD-001**

PETITION OF AT&T CORP. FOR FURTHER RECONSIDERATION

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Dated: August 31, 2018

Counsel for AT&T Corp.

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PETITION OF AT&T CORP. FOR FURTHER RECONSIDERATION OF THE AUREON *RECONSIDERATION ORDER*

Pursuant to 47 C.F.R. § 1.106, AT&T Corp. ("AT&T") hereby submits this Petition for Further Reconsideration of the Commission's August 1, 2018 Order on Reconsideration ("*Reconsideration Order*")[1] of the Commission's Memorandum Opinion and Order, dated November 8, 2017 ("*Liability Order*").[2]

INTRODUCTION AND SUMMARY

In the *Reconsideration Order*, the Commission rejected Aureon's argument that it did not have fair notice that it was a CLEC for purposes of the *Transformation Order*[3] and expressly reaffirmed its finding that the maximum just and reasonable rate that Aureon could have charged during the relevant period (mid-2013 to 2018) was the *lower* of the CLEC benchmark rate under Section 61.26 and Aureon's cost-of-service rate under Section 61.38. *Reconsideration Order*, ¶¶ 6-10, n.35. However, notwithstanding (i) its earlier determination that Aureon's rates for periods after July 1, 2013 would be determined based on a "detailed review" in the damages phase of the proceeding (*see Liability Order* ¶ 35) and (ii) its recent determination that the benchmark rate for Aureon was lower than Aureon's 2012 rate,[4] the Commission concluded that Aureon's prior 2012 tariff "retained its legal status" and was thus the operative rate for the entire mid-2013-to-2018 period, unless AT&T could show in the damages phase that Aureon engaged in "furtive

[1] Order on Reconsideration, *AT&T Corp. v. Iowa Network Servs., Inc., d/b/a Aureon Network Servs*., FCC 18-116, Proceeding No. 17-56, Bureau ID No. EB-17-MD-001 (Aug. 1, 2018) ("*Reconsideration Order*").

[2] Memorandum Opinion and Order, *AT&T Corp. v. Iowa Network Servs., Inc., d/b/a Aureon Network Servs*., 32 FCC Rcd. 9677 (2017) ("*Liability Order*").

[3] *In re Connect Am. Fund*, 26 FCC Rcd. 17663 (2011) ("*Transformation Order*").

[4] Memorandum Opinion and Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, 2018 WL 1898713 (rel. July 31, 2018) ("*Rate Order*").

concealment" of accounting violations that deprived the 2012 tariff of its "deemed lawful" status. *Reconsideration Order*, ¶ 17.

For several reasons, the Commission's decision to use the 2012 tariffed rate as the basis for measuring AT&T's damages is unlawful and should be reversed. *First,* Section 206 of the Act expressly provides that Aureon "shall" be liable for the "full amount of damages sustained in consequence" of its unjust and unreasonable rates. 47 U.S.C. § 206. Under the Commission's precedents, the "proper measure of the damages" is at a minimum "the difference between the unlawful rate" and what the "just and reasonable rate" should have been.[5] By holding in the *Liability Order* that it would conduct a further proceeding to determine what Aureon's rate should have been (¶ 35), the Commission correctly stated the applicable law in the *Liability Order*—but improperly and arbitrarily changed its view on reconsideration. As explained in greater detail below, Aureon's 2012 tariff rate is irrelevant to that determination. Moreover, the Commission's contrary interpretation would permit CLECs to avoid their obligations to lower their rates, particularly in the context of the Commission's transition to a bill and keep regime by ignoring rate cap reductions and then, when they are caught, being permitted to collect *higher* rates under their old tariffs. Neither Section 204(a)(3) nor Section 206 can be interpreted to justify such a result in these circumstances, and the Commission's change in position would deprive customers charged unreasonable rates, in excess of Commission-prescribed rate caps, of their statutory right to recover the "*full* amount of [their] damages." 47 U.S.C. § 206 (emphasis added).

[5] *New Valley Corp. v. Pac. Bell*, 15 F.C.C. Rcd. 5128, ¶ 12 & n.27-28 (2000) ("*New Valley*"); *see also Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period*, 8 FCC Rcd 1876, 1880; *Reiter v. Cooper*, 507 U.S. 258, 262-63 (1993).

Second, Aureon's 2012 tariffed rate of $0.00623 per minute ("/min.") could not constitute the just and reasonable rate for periods after July 1, 2013. Aureon's 2012 rate almost certainly exceeds the CLEC benchmark rate—which, as of July 1, 2013, became the applicable rate cap for Aureon. *See* 47 C.F.R. § 51.911(c). In its *Rate Order*, the Commission determined that the "applicable competitive LEC benchmark rate," at least as of 2018, is "$0.005634"—which is well below the 2012 rate.[6] Under the Commission's rules, there is "mandatory detariffing for access rates in excess of the [CLEC] benchmark"—and, after July 1, 2013, Aureon could not have lawfully filed a tariff at the level of its 2012 rate.[7] Because Aureon's 2012 rate of $0.00623/min. exceeds the Commission's own determination of the CLEC benchmark rate, it is plain error for the Commission to have concluded in its *Reconsideration Order* that the 2012 rate remained in effect after July 1, 2013. *Id.* ¶ 17. As of that date, the 2012 tariff rate violated the applicable rate cap, and was thus unlawful, for the same reasons that the Commission found Aureon's 2013 tariff rate to be unreasonable. *See id.* ¶ 13 (the "rate caps [take] the place of the legal tariff rates that carriers had previously set").

Additionally, there is substantial evidence that the 2012 rate was significantly higher than a properly computed cost-of-service rate for the post July 2013 period. In the *Rate Order*, the Commission found that Aureon had used an improper cost allocation methodology and had failed to comply with other Commission's rules in developing its 2018 cost-of-service tariffed rate.

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[6] *Id*. ¶ 2. AT&T contends that the Commission erred in computing the CLEC benchmark, and on August 30, 2018 filed a petition for reconsideration of the *Rate Order* on that issue.

[7] *See* Seventh Report and Order, *In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 3, 82-87 (2001) ("*Seventh Report and Order*") ("we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark"); *see also* Brief for Amicus Curiae FCC, *Paetec Commc'ns v. MCI Commc'ns*, Nos. 11-2268 & 11-1204, 2012 WL 992658, at *25-26 (3d Cir. Mar. 14, 2012) ("FCC PaeTec Brief").

There is no dispute that Aureon used those same improper methodologies in its prior rate filings, which means that Aureon's cost-of-service rates for 2013 to 2018 were also misstated. In fact, AT&T presented extensive evidence in the complaint case demonstrating that Aureon's cost-of-service rates for periods after July 1, 2013, if properly calculated, would be well below the 2012 rate. In these circumstances, it was both arbitrary and capricious for the Commission to pre-empt the damages inquiry by declaring it would use Aureon's 2012 rate as the basis for calculating damages for the 2013-2018 period.

Finally, the Commission cannot lawfully rely on the 2012 rate for other reasons. Aureon's own witnesses in the complaint case testified that 2012 rate was **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** at the time it was filed. Further, the Commission's cost of service rules required Aureon to file new tariffs in both 2014 and 2016. Accordingly, it was arbitrary for the Commission to simply assume that Aureon would have defied these mandatory duties and left its 2012 tariff in place (and charged that rate) until 2018. Even under the Commission's flawed approach on reconsideration, it should have limited its reliance on the 2012 tariff rate to the July 1, 2013 to June 30, 2014 period, and thereafter it should have assumed that Aureon would have filed new tariffs with rates that complied with the *Transformation Order* and its cost of service rules.

BACKGROUND

To understand the issues, it is helpful to review (1) the *Transformation Order* rules that established the rate caps that govern Aureon's rates; (2) the Commission's *Liability Order*, which held that Aureon's 2013 tariff violated the Commission's rate cap regulations and was unjust and unreasonable; and (3) the proceedings that have occurred since the *Liability Order*, which led to both the *Reconsideration Order* and the *Rate Order*.

1. The *Transformation Order* Rules

In its 2011 *Transformation Order*, the Commission adopted various rate caps and rate parity rules designed to transition most terminating access charges to a default bill-and-keep system. As the Commission determined in the *Liability Order*, Aureon is a CLEC for purposes of these *Transformation Order* rules.[8] As such, since December 29, 2011, Aureon has been subject to Section 51.911,[9] which includes three specific duties. First, Aureon's then-existing rates were capped as of December 29, 2011.[10] Second, Aureon was required to reduce gradually its intrastate rates to bring them into parity with its interstate rates.[11] Third, and most significantly for present purposes, "[b]eginning July 1, 2013," and "notwithstanding any other provision of the Commission's rules," Section 51.911(c) specified that Aureon's rates for switched access service "shall be no higher" than the rates charged by the "competing [ILEC], in accordance with the same procedures specified in §61.26."[12]

Under a straightforward application of Section 51.911(c), Aureon became subject to the CLEC benchmarking procedures of Section 61.26 as of July 1, 2013.[13] Under those procedures, a CLEC may tariff rates only if they are at or below the "rate charged for such service by the competing ILEC."[14] The procedures in Section 61.26 also require mandatory detariffing of rates above the benchmark: the Commission invoked its forbearance authority to eliminate all tariff

[8] *Liability Order*, ¶ 25; 47 C.F.R. § 51.903(a).

[9] 47 C.F.R, § 51.911.

[10] *See Transformation Order*, ¶¶ 800-01 (interstate cap); 47 C.F.R. § 51.911(a)(1) (intrastate cap).

[11] 47 C.F.R. § 51.911(b).

[12] 47 C.F.R. § 51.911(c).

[13] 47 C.F.R. § 61.26.

[14] *Seventh Report and Order*, ¶¶ 3, 40.

filing authority and requirements—including those in Section 203 and in Section 204(a)(3)—for tariffed rates that exceed the benchmark.[15]

2. The *Liability Order*

This dispute began when Aureon filed a complaint in U.S. District Court, which ultimately referred matters to the Commission. Upon referral, AT&T filed a formal complaint under Section 208. 47 U.S.C. § 208. In the *Liability Order*, the Commission found that in mid-2013 Aureon violated the Act by filing and charging an unjust and unreasonable rate.[16] The Commission further held that Aureon was subject to the general rate caps and rate parity rules in Section 51.911(c) that apply to "any" CLEC, and that Aureon also remained subject to the cost-of-service rules in Section 61.38.[17] Accordingly, Aureon's tariff filing in mid-2013 was not "deemed lawful," and its rates as of July 1, 2013 had to be the *lower* of the CLEC benchmark in Section 51.911(c) *or* Aureon's cost-of-service rates under Section 61.38.

Because AT&T's complaint bifurcated the liability and damages issues, the Commission did not determine what Aureon's rates would have been under either of those scenarios, but instead deferred those issues to a follow-on damages proceeding. As the Commission correctly recognized in the *Liability Order*, in the subsequent damages phase, for the period in which Aureon lacked a deemed lawful tariff, it would need to "conduct a detailed review of Aureon's rates to determine what the appropriate tariff rates should have been."[18] That is because the Commission, having

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[15] *Id.* ¶¶ 82-87; 47 C.F.R. § 61.26(b)(1) ("a CLEC *shall not* file a tariff for its interstate switched exchange access services that prices those services … higher [than t]he rate charged for such services by the competing ILEC" (emphasis added)); FCC PaeTec Brief at 26.

[16] *Id.* ¶ 35 ("we have found … that Aureon violated Sections 201(b) and 203 of the Act because its rates were not just and reasonable.").

[17] *Id.* ¶¶ 23-29.

[18] *Liability Order*, ¶ 35; *id.* ¶ 30.

found a violation of Sections 201(b) and 203 and that Aureon had no "deemed lawful" tariff in this period, is obligated under Section 206 to determine the "full amount of damages sustained in consequence of … such violation." 47 U.S.C. § 206 (a common carrier "*shall be liable* to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation" (emphasis added)).

3. Proceedings Since the *Liability Order*

In its *Reconsideration Order*, the Commission denied most of Aureon's claims. In particular, the Commission expressly reaffirmed that (1) Aureon had fair notice that it would be a CLEC for purposes of the *Transformation Order* rules and that the rate cap and rate parity rules would apply to it (*id.* ¶¶ 6-10); and (2) the highest rate Aureon could lawfully charge during the period from mid-2013 to 2018 was the *lower* of the CLEC benchmark rate under Section 51.911(c) and the cost-of-service rate under Section 61.38. *Id.* ¶ 10 n.35.

The Commission also rejected Aureon's claim that its 2013 rate was "deemed lawful" under Section 204(a)(3), and thus any relief must be prospective only. *Id.* ¶¶ 11-15. The Commission further reaffirmed the *Liability Order*'s finding that Aureon's 2013 tariff, to the extent it contained above-cap rates, was void *ab initio*. *Id.* A "rate prohibited by the Commission's rules" is not a rate that "a carrier 'may' file under Section 204(a)(3)," and thus the 2013 tariff was never a "legal" filing in the first place, and the 2013 rate could not have been "deemed lawful."[19]

The Commission, however, granted Aureon's petition in one respect: it agreed that the rate in Aureon's 2012 tariff should be treated as the operative rate during the mid-2013 to 2018 period, subject to AT&T's ability to show that that rate was the product of furtive concealment. The

[19] *Id.* ¶ 14; *see id.* ¶ 15 ("A filing that contains rates that the carrier is not permitted to charge does not even meet the preliminary standard for a legal tariff filing, and therefore cannot become a 'deemed lawful' tariff by operation of Section 204(a)(3).").

Commission reasoned that, because the 2013 tariff was void *ab initio* and "therefore never went into effect," the 2012 tariff "retained its legal status." *Id.* ¶ 17. Additionally, because the 2012 rate complied with the applicable rate caps at the time it was filed and was not suspended or declared void, the Commission held that it would treat the rate in the 2012 tariff as "deemed lawful," even after July 1, 2013. *Id.* The Commission did leave open the possibility that AT&T could show that the 2012 tariff was not "deemed lawful" because Aureon had furtively employed improper accounting techniques that concealed potential rate-of-return violations, but it indicated AT&T would have to satisfy a "high legal threshold" to sustain such a claim.[20]

Simultaneous with the issuance of the *Reconsideration Order*, the Commission issued the *Rate Order*, in which it reaffirmed its determination that Aureon was subject to the CLEC benchmark rules, concluded that CenturyLink was the competing ILEC for purposes of determining the applicable CLEC benchmark rate, and found that the CLEC benchmark rate (at least as of 2018) is $0.005634/min. Although AT&T believes that a correct calculation of the CLEC benchmark rate would be even lower (at most $0.003188 per minute), the Commission's own determination is well below Aureon's 2012 rate of $0.00623/min.

ARGUMENT

I. THE COMMISSION VIOLATED SECTION 206, AND UNLAWFULLY AND PREMATURELY LIMITED AT&T'S DAMAGES BY IMPROPERLY RELYING ON AUREON'S 2012 RATE.

The *Reconsideration Order*'s approach to damages violates Section 206 and the Commission's own precedents. In the *Liability Order*, the Commission determined that Aureon's 2013 rate was unjust and unreasonable—*i.e.*, the rate was above at least one of the applicable rate

[20] *Id.* ¶ 18 n.58; *see also id.* ¶ 18 n.60 (furtive concealment language in the *ACS* opinion was "dicta" and "the Commission has never awarded refunds on this basis").

caps. As a result, the 2013 rate was *not* "deemed lawful" under Section 204(a)(3), because the tariff exceeded the Commission-prescribed rate caps. *See also* infra Part III (mandatory detarrifing for above benchmark rates).

Faced with these liability determinations, Section 206 is clear: Aureon "shall" be liable for the "full amount of damages sustained in consequence" of charging and collecting unreasonably high rates.[21] And the Commission's damages precedents are clear as to what that means: the "proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate" would be—at a minimum—"the difference between the unlawful rate" and what the Commission determines the "just and reasonable rate" should have been.[22]

Further, the Commission cannot avoid this statutory duty. The courts have held that the damages obligation in Section 206 is "phrased in mandatory terms."[23] Consequently, Section 206 and the Commission's damages precedents require the Commission to determine what the just and reasonable rate should have been during the period mid-2013 through 2018, and then to award damages based on the "difference between the unlawful rate" (Aureon's 2013 tariffed rates that it charged AT&T) and the "just and reasonable rate" the carrier should have charged.[24] The

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[21] 47 U.S.C. § 206; *Liability Order*, ¶ 35.

[22] *New Valley*, ¶ 12 & n.27-28; *see also Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period*, 8 FCC Rcd. 1876, ¶¶ 21-23 (1993); *Reiter v. Cooper*, 507 U.S. 258, 262-63 (1993). Indeed, as AT&T has argued, the fact that the 2013 tariff was void *ab initio* means that Aureon has no lawful vehicle to collect any charges at all. Although the Commission did not accept a similar argument in *New Valley*, AT&T intends in the damages phase to show that this aspect of *New Valley* (to the extent it was ever valid) has been undermined by more recent Commission precedent holding that, if a CLEC like Aureon lacks a negotiated contract with an IXC for access service or does not have a "valid interstate tariff" on file for access service, the CLEC "lacks authority to bill for those [access] services." *E.g.*, *AT&T v. All American*, 28 FCC Rcd. 3477, ¶ 37 (2013).

[23] *MCI v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995).

[24] *New Valley*, ¶ 12 & n.27-28.

Commission had it right in the *Liability Order*: it explicitly recognized that, in the damages phase, it would need to "conduct a detailed review of Aureon's rates to determine what the appropriate tariff rates should have been" during that period.[25]

In the *Reconsideration Order*, however, the Commission abruptly reversed course. The Commission held that it would *not* conduct a Section 206 damages inquiry—*i.e.*, it would not determine what Aureon's rates should have been under Section 201(b) and 203 from mid-2013 to 2018. Rather, it reasoned that, because it had declared Aureon's 2013 tariff to be void *ab initio*, Aureon's 2012 tariffed rate (which had been deemed lawful under Section 204(a)(3) when filed) "retained its legal status" as the operative tariff. The Commission thus held that it would treat the 2012 rate as the lawful, applicable rate throughout the period July 1, 2013 to February 28, 2018, unless AT&T could establish that Aureon had engaged in "furtive concealment" in 2012 when it originally developed that rate for filing.[26]

The *Reconsideration Order*'s analysis completely misconceives the issue. In the *Liability Order*, the Commission found that Aureon's 2013 rate violated Sections 201(b) and 203 because it had exceeded the maximum just and reasonable rate, and was not "deemed lawful." The *Reconsideration Order* expressly reaffirmed that finding, as well as the determination that the maximum rate Aureon could have charged was the *lower* of the CLEC benchmark rate under Section 51.911(c) or the cost-of-service rate under Section 61.38. Section 206 therefore *requires* the Commission to award AT&T the "full amount of damages" from that violation, which logically can only be determined in relation to what the just and reasonable rate should have been starting in July 2013.

[25] *Liability Order*, ¶ 35; *id.* ¶¶ 24 & n.132, 30.

[26] *Reconsideration Order*, ¶ 17.

The 2012 tariff is irrelevant to that Section 206 damages calculation. As explained below, during the July 1, 2013 to February 28, 2018 period, the 2012 rate would have been a manifestly unjust and unreasonable rate, because it was substantially above both the CLEC benchmark and the applicable cost-of-service rate. Consequently, by pre-emptively declaring the 2012 rate the operative rate, the Commission has denied AT&T any opportunity to recover the "full amount" of its damages under Section 206. The Commission had no basis for abdicating its duty under Section 206 in this respect.[27]

The fact that the 2012 tariff may have been initially "deemed lawful" under Section 204(a)(3) when it was filed does not override the Commission's independent duty under Section 206 to determine AT&T's damages based on what the just and reasonable rate should have been. The only case the Commission cites for that proposition is inapposite.[28] In the *V.I. Tel.* case, the Commission vacated a decision suspending a carrier's tariff, and the court held that vacating a suspension order restored the tariff to its prior, deemed lawful status (as if the suspension had never occurred). The *V.I. Tel*. rationale does not apply here, because in this case the opposite happened: the *Reconsideration Order* expressly reaffirmed that Aureon's charges were *unlawful*.[29] Where a

[27] In a section 208 proceeding, AT&T, as the complainant, bears the burden of proof to establish what a reasonable rate should have been. However, the Commission's *Reconsideration Order* effectively denied AT&T the opportunity to meet that burden and instead imposed a significantly higher burden, requiring what the Commission characterized as a "high legal threshold" to establish that Aureon engaged in furtive concealment. *See Reconsideration Order*, ¶ 18 n.58. Worse yet, the Commission's *Reconsideration Order* changes the burden of proof and its stated damages standards—without even acknowledging the change. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (change in precedent "ordinarily demand[s] that [agency] display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

[28] *See Reconsideration Order*, ¶ 17 n.54 (citing *V.I. Tel. v. FCC*, 444 F.3d 666, 671-72 (D.C. Cir. 2006)).

[29] *Id*. ¶¶ 6-15.

carrier charges and collects *unlawful* rates that are not "deemed lawful," Section 206 requires a determination of the "full" damages—not mechanical application of a prior tariff.

The Commission is assuming that, in the "but for" world, Aureon would not have filed any tariff of any kind at any point during the period July 1, 2013, through February 28, 2018. That assumption is improper and takes the "void *ab initio*" concept too far. The only reasonable way to interpret and apply Sections 204 and 206 here is to determine what rate Aureon should have included in in the tariff it filed on July 1, 2013. Aureon's 2013 tariff, both in real life and in the "but-for" world, displaced the 2012 tariff and rendered irrelevant questions about whether the 2012 tariff could remain "deemed lawful" after July 1, 2013.

Further, the *Reconsideration Order*'s approach would lead to absurd and untenable results. The Commission may have believed that restoring the 2012 rate here would have provided some benefit, since the 2012 rate was below the 2013 rate, but that will not always be the case. In fact, the opposite result is likely to be the norm in the current era, in which the Commission is often establishing transitions to bill-and-keep that rely on descending rate caps over multi-year periods (such as the one the Commission recently proposed for originating access for 8YY traffic).[30]

For example, suppose, in such a transition, the Commission caps a rate at one cent/minute in Year 1 and at 0.5 cents/minute in Year 2. Suppose further that a CLEC tariffs a one-cent-per-minute rate in Year 1 in compliance with the cap, which becomes deemed lawful. The *Reconsideration Order* gives that CLEC an incentive to file an above-cap rate in Year 2—say, 0.99 cents per minute. Under the *Reconsideration Order*, a successful complaint establishing that the tariff was void *ab initio* would simply reinstate the one-cent rate. The CLEC wins either way:

[30] *See* Further Notice of Proposed Rulemaking, *8YY Access Charge Reform*, WC Docket No. 18-156 (released June 8, 2018).

it either charges the new 0.99-cent rate, or it "loses" a complaint case and gets to collect the prior one-cent rate. The *Reconsideration Order* thus establishes a method for evading such multi-year descending caps; no carrier would ever have to comply with the Commission's transitions to bill-and-keep, at least until after Commission engages in carrier-specific rate prescriptions.

For all of these reasons, in holding that the 2012 rate would apply in lieu of a tariff not deemed lawful (and absent a finding of furtive concealment), the Commission prematurely and improperly prevented AT&T from establishing the "full amount of damages" for which, under the Act, a common carrier like Aureon "shall be liable" when it violates the Act. 47 U.S.C. § 206. Section 206 and the Commission's precedents require the Commission to determine damages based on the rate Aureon should have filed in its 2013 tariff (and thereafter), not based on Aureon's 2012 tariff. By holding that the damages proceeding will not consider these issues, and will not determine what the reasonable rate for Aureon's post-July 2013 service would have been, the Commission has violated Section 206 and its own damages precedents.

II. AUREON'S 2012 RATE CANNOT BE A REASONABLE OR LAWFUL RATE AS OF JULY 1, 2013.

The Commission's *Reconsideration Order* is also erroneous because Aureon's 2012 rate cannot lawfully be a just or reasonable rate for the period from mid-July 2013 through 2018.

First, beginning on July 1, 2013, the applicable rate cap for Aureon is the CLEC benchmark rate, 47 C.F.R. § 51.911(c), and the Commission determined in the *Rate Order* that the benchmark rate, at least as of 2018, is $0.005634/min. Aureon's 2012 rate of $0.00623/min. *exceeds* that benchmark rate and thus would have been unjust and unreasonable as of July 1, 2013. In fact, because the Commission has forborne from the tariffing requirements of the Act for rates above the benchmark, Aureon and the Commission lacked authority to enforce the 2012 tariff rate as of July 1, 2013. The *Reconsideration Order* is therefore unlawful and erroneous on this ground alone.

Second, it was arbitrary for the Commission to apply Aureon's 2012 rate to future periods from mid-2013 to 2018, given that (i) Aureon withdrew the 2012 rate voluntarily because it was flawed, (ii) the 2012 rate relied on the same unlawful methodologies that the Commission condemned in the *Rate Order*; and (iii) Aureon's actual cost-of-service rate from mid-2013 to 2018 was almost certainly far below the 2012 rate, due to the "significant questions" AT&T raised in the complaint case regarding Aureon's rates. *See Liability Order*, ¶ 30. While Section 204(a)(3) may protect Aureon prior to July 1, 2013, nothing in that Section compels the Commission to ignore all the warts underlying the 2012 rate for later periods, when the Commission has determined—and re-affirmed—that Aureon unlawfully charged AT&T an unreasonable rate under a tariff that *was not* deemed lawful. In these circumstances, it was arbitrary to use an unreasonable rate to limit Aureon's liability after July 1, 2013.

Third, even if the 2012 rate could somehow apply beginning in July 2013, the Commission acted arbitrarily in assuming that Aureon would not have followed its obligation to refile its tariff in 2014 and 2016 with rates that complied with the *Transformation Order*. Consequently, the Commission's determination that the 2012 rate applied to periods after mid-2014 was arbitrary for this additional reason.

A. The *Reconsideration Order* Is Unlawful Because It Puts In Place A Rate That Exceeds The CLEC Benchmark Rate.

The Commission's decision to treat Aureon's 2012 rate as the applicable rate from mid-2013 through 2018 is unlawful, because the 2012 rate violates Section 51.911(c) and the CLEC benchmark rules for the entirety of that period.[31]

[31] *See* AT&T Opp. to Recon. Pet. at 14 & n.16; *id*. at 19.

Under Section 51.911(c), Aureon's rates became subject to the CLEC benchmark "[b]eginning July 1, 2013."[32] In fact, in the *Liability Order*, the Commission explicitly held that if "Aureon's rates exceed this [CLEC] benchmark … the rates in Aureon's intrastate or interstate tariff would also be unlawful under Section 51.911(c)."[33] Accordingly, Aureon's 2012 rate—which is $0.00623/min.—cannot be the appropriate rate after July 1, 2013 because it exceeded the CLEC benchmark rate.

In the *Liability Order*, the Commission found that it did not have sufficient information to determine the level of the CLEC benchmark as of July 1, 2013, and deferred that issue to the damages phase of the proceeding.[34] In its *Rate Order*, however, the Commission addressed that issue and held that the "applicable competitive LEC benchmark rate," at least as of 2018, is "$0.005634/min"[35] Aureon's 2012 rate thus substantially exceeds the Commission's own determination of the current CLEC benchmark rate (which AT&T believes is too high).[36]

Because Aureon's 2012 rate exceeds the benchmark rate (as found by the Commission in the *Rate Order*), the Commission's conclusion in the *Reconsideration Order* that the 2012 rate

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[32] 47 C.F.R. § 51.911(c) ("[b]eginning July 1, 2013," a CLEC's rate shall be no higher than the competing ILEC, in "accordance with the same procedures specified in § 61.26").

[33] *Liability Order*, ¶ 24.

[34] When it issued the *Liability Order*, the Commission "did not reach the issue of whether Aureon's rates violate Section 51.911(c) because we do not have an adequate record to determine the pertinent benchmark rate." *Id.* ¶ 24. The Commission stated that it would "develop such facts in the damages phase of the proceeding." *Id.* ¶ 24 n.132.

[35] *Rate Order*, ¶ 2.

[36] As previously noted, AT&T contends that the Commission erred in computing the CLEC benchmark, and that it is in fact at most $0.003188/minute. *See supra* note 6. Because of the method the Commission used to calculate the benchmark rate, it is possible that the benchmark rate that the Commission determined in the *Rate Order* could be slightly different from the applicable benchmark rate in 2013 (or other years). If that is the case, however, that is all the more reason why the Commission should have proceeded with its initial determination to develop an adequate record in the damages proceeding and then to decide the level of the CLEC benchmark in 2013 (and possibly at other points).

remained in effect from July 1, 2013 to 2018 is erroneous and unlawful. The 2012 rate cannot be the applicable rate in light of the Commission's *mandatory* detariffing of CLEC rates above the benchmark. Section 51.911(c) expressly incorporates the "procedures" of Section 61.26, and Section 61.26 expressly *prohibits* CLECs from tariffing any rate above the CLEC benchmark.[37] That prohibition is an exercise of the Commission's forbearance authority: as the Commission has explained, "a CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark," and "[i]n order to implement this approach, we adopt mandatory detariffing for access rates in excess of the [CLEC] benchmark."[38] In other words, the Commission concluded that it would "forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark."[39]

Given this forbearance, the Section 203-05 tariffing regime simply does not exist as a source of authority for CLEC tariffed rates above the benchmark.[40] As a result of mandatory detariffing, the Commission can no longer enforce any of "the Act's tariffing requirements" as they relate to CLEC rates above the benchmark, and that includes the "deemed lawful" provisions of Section 204(a)(3).[41] In fact, that was the explicit basis for the Commission's holding, reaffirmed

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[37] 47 C.F.R. § 61.26(b)(1) ("a CLEC *shall not* file a tariff for its interstate switched exchange access services that prices those services … higher [than t]he rate charged for such services by the competing ILEC" (emphasis added)); *see also* FCC Paetec Brief at 25 ("A CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Section 61.26 is subject to mandatory detariffing," and "[u]nder that regime, a carrier is *prohibited* from filing a tariff . . . .").

[38] *Seventh Report and Order*, ¶ 82.

[39] *Id.* Notably, Aureon has conceded that there is forbearance in these circumstances. *See* Aureon Pet. for Recon. at 15 n.50.

[40] *Seventh Report and Order*, ¶ 82 ("we exercise our statutory authority to forbear from the enforcement of . . . the Act's tariff requirements"); FCC Paetec Brief at 25-26.

[41] *Id.*; FCC Paetec Brief at 26 ("Section 204(a)(3) is one of 'the Act's tariff requirements' subject to the FCC's forbearance action, so 'deemed lawful' status under that statutory provision is not available for CLEC switched access charges above the benchmark in Rule 61.26(c).").

in the *Reconsideration Order*, that a tariff that is filed with a rate above the benchmark is void *ab initio* and cannot be "deemed lawful."[42] Under that same logic, however, the Commission has also "forb[orne] from the *enforcement*" of any tariffed rate that later becomes higher than the benchmark.[43] Simply stated, Aureon cannot invoke the statutory tariffing regime, or the Commission's enforcement mechanisms, in an effort to force AT&T to pay tariffed, above-benchmark rates after mid-2013. Above the benchmark, there is no Section 203 or 204 regime to invoke—or that the Commission has the power to enforce.[44]

Because all CLECs (including Aureon for these purposes) are prohibited from filing tariffs with rates above the applicable benchmark, the Commission for the same reason lacks authority to enforce Aureon's ability to charge a rate, filed in a prior tariff, that exceeds the benchmark. The Commission's theory in the *Reconsideration Order* is that the 2012 rate was "deemed lawful" and, because it was never cancelled by the void 2013 tariff, it retained its "legal status." The Commission's mandatory detariffing of rates above the CLEC benchmark, however, means that the 2012 tariffed rate could not retain its *lawful* status because that rate exceeded that benchmark. At a minimum, the Commission was obligated to determine the level of the CLEC benchmark as of July 1, 2013.

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[42] *Reconsideration Order*, ¶¶ 13-15.

[43] *Seventh Report and Order*, ¶ 82; *see also id*. ("a CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark," and "[d]uring the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate").

[44] It makes no difference whether the 2012 rate was or was not consistent with the rate caps when it was filed. As the Commission Staff has held, "[t]ariffs that are lawful at the time that they are filed may subsequently become unlawful based on particular circumstances." *In the Matter of GS Texas Ventures, LLC*, 29 FCC Rcd. 10541, ¶ 6 n.19 (2014). Those circumstances include instances when a CLEC files a tariff and the benchmark rate is lowered, as occurs when a CLEC engages in access stimulation (*id*.)—or, as occurred here, when the Commission's rate caps require a lower rate.

The approach adopted by the Commission in the *Reconsideration Order* is also problematic because it is internally inconsistent. The Commission's finding in the *Rate Order* that the current benchmark is much lower than the 2012 rate should have led it to reaffirm the position it took in the *Liability Order—i.e.*, that the Commission would determine what the proper rate should have been after July 1, 2013, in the damages phase of the proceeding. *See Liability Order*, ¶ 24 & n.132. Instead, it abandoned that position and arbitrarily found that the 2012 rate would be applicable (subject to resolution of the furtive concealment issue).

Additionally, the Commission has already held—and the *Reconsideration Order* reaffirmed—that the rate caps displace existing tariffed rates. In paragraph 13 of the *Reconsideration Order*, the Commission stressed that its "rate caps," once established, must take "the place of the legal tariff rates that carriers had previously set."[45] In so ruling, the Commission noted that the rate caps represent the Commission's judgment that any tariffed rates higher than the rate caps (including the CLEC benchmark rate) would be "per se unreasonable" and would "encourage arbitrage."[46] The Commission further observed that "[o]nce the Commission issued the rate caps, 'its pronouncement had the force of a statute,' and carriers 'were bound to confirm.'"[47] And the Commission concluded it was "obligated to enforce [the rate caps] in complaint proceedings like this one," because courts have found that the Commission cannot ignore such "quasi-legislative . . . enactments" as to "the reasonableness of the rate it has prescribed" in a subsequent adjudication.[48]

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[45] *Reconsideration Order*, ¶ 13.

[46] *Id.*

[47] *Id*. (quoting *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 386-87 (1932)).

[48] *Id.* ¶ 13 (quoting *Arizona Grocery Co.*, 284 U.S. at 389); *see also id.* ¶ 13 n.43 ("the Commission has also been delegated 'undoubted power' to set rates for the future" (quoting *Arizona Grocery Co.*, 284 U.S. at 389)).

The *Reconsideration Order* is thus internally inconsistent. In the first part of the order (¶ 13), the Commission correctly found that the rate caps must take precedence over Aureon's 2013 tariff; but in the second part of the order (¶ 17), the Commission purports to give Aureon's 2012 tariff precedence over the rate caps. Because the rate caps have "the force of a statute," that latter determination is clearly erroneous. The rate caps must take "the place of the legal tariff rates that carriers had previously set," and that is equally true here whether Aureon "set" those rates in its 2012 tariff or its 2013 tariff. *Reconsideration Order*, ¶ 13.

B. It Was Arbitrary For The Commission To Put Into Effect a 2012 Rate That Aureon Withdrew, That Was Based On Unlawful Methodologies, and That May Be Far Higher Than Aureon's Actual Cost-of-Service Rate From Mid-2013 To 2018.

The *Reconsideration Order* is also arbitrary because, even though the Commission found that Aureon lacked a valid, deemed lawful tariff from mid-2013 to 2018, the Commission proceeded to substitute a tariff rate that the Commission knows has substantial and material errors. Nothing in the Act or the Commission's precedents supports, let alone requires, such a result.

The Commission's embrace of Aureon's 2012 rate in three paragraphs (¶¶ 16-18) of the *Reconsideration Order* is wholly at odds with the evidence and the Commission's own findings in this case and in the *Rate Order*. To start, during the complaint case, Aureon's own witnesses conceded that the 2012 rate was **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** at the time of its filing,[49] and AT&T presented evidence showing that Aureon's cost of service rate for 2012, if properly computed, would have been

[49] *See* Schill Deposition, AT&T Ex. 87 at 78:10-78:14 **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** *see also* Rhinehart Supp. Decl. ¶¶ 13-14.

[[BEGIN HIGHLY CONFIDENTIAL]] [redacted] **[[END HIGHLY CONFIDENTIAL]]** (*see* Rhinehart Supp. Decl., Table P), which is **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** the 2012 rate of $.0.00623/min.[50] Further, the very fact that Aureon voluntarily elected in 2013 to withdraw prematurely its 2012 tariff rate also supports the conclusion that the 2012 rate was not just and reasonable. Under the Commission's rules, Aureon was not obligated to revise its 2012 tariff rate until mid-2014. Nevertheless, Aureon decided to refile its rates, claiming in its tariff filing that the 2012 rate was no longer appropriate.[51] Given Aureon's own admissions about the flaws underlying its 2012 rate, it was arbitrary for the Commission to reinstate that rate.

Further, in the complaint proceeding, AT&T presented extensive evidence demonstrating that when properly computed, Aureon's cost-of-service rate for periods after July 1, 2013 would be in the range of **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]. **[[END HIGHLY CONFIDENTIAL]]** (*see* Rhinehart Supp, Decl. Table P)—which is also well **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** And, the Commission in the *Liability Order* agreed that AT&T had raised "significant questions" about Aureon's rates—including its 2012 rate.[52] Additionally, in the *Rate*

[50] AT&T also demonstrated that the 2012 rate suffered from a number of other issues, including that Aureon over-allocated CWF fiber costs to the Access Division, and that there was **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** *See* Rhinehart Supp. Decl. ¶¶ 16-38.

[51] *See* AT&T Ex. 20, Aureon 2013 Tariff Filing, at AUREON_01693 ("For the year 2012, INAD's regulated revenue from interstate access services amounted to $25,537,382 which resulted in a return of 64.57% on its interstate investment. INAD is currently projecting a loss for the year 2013 which will offset the overearnings for the year 2012.").

[52] *Liability Order*, ¶ 30.

Order, the Commission found that the same methodologies that were used to derive Aureon's 2012 rate were unlawful.[53]

Given these facts, and the fact that the Commission has not yet determined the cost-of-service rate either for the current period or for past periods, it would be arbitrary and unlawful for the Commission to allow Aureon to bill and collect based on its higher 2012 rate. In the *Liability Order*, the Commission held that it would conduct a damages proceeding to determine whether Aureon's cost-of-service rates for the mid-2013 to 2018 period (when properly computed) were lower than the 2012 rate and the CLEC benchmark rate.[54] However, the Commission arbitrarily reversed course in the *Reconsideration Order*, and determined that it would allow Aureon to bill and recover based on the 2012 rate, regardless of what Aureon's cost-of-service rate was during this period. It is unlawful to impose the 2012 rate for future periods, when all of the existing evidence strongly suggests that Aureon's actual cost-of-service rates, if properly computed using the methodologies the Commission found appropriate in the *Rate Order*, were much lower.

Finally, the Commission's assertion that it was compelled by Section 204(a)(3) to rely on the 2012 rate because its "void *ab initio*" finding as to Aureon's 2013 tariff meant that Aureon "did not cancel or supersede [its] 2012 tariff," which thus "retained its legal status" (*id.* ¶ 17) misses the point and exalts form over substance. As to Section 204(a)(3), while the deemed lawful doctrine may protect Aureon from refunds prior to July 1, 2013 (unless it engaged in furtive concealment), the doctrine does *not* apply for periods *after* that time—as the Commission

[53] *See, e.g.*, *Rate Order*, ¶ 87 (Aureon's "circuit method does not produce a reasonable allocation of [its] network costs"); *id.* ¶ 61 ("Aureon has violated Section 32.27(c)(2) of our rules" as to its lease expense); *id.* ¶ 78 ("Aureon has failed to comply with Section 64.901(b)(4) of our rules" by misallocating costs). In these circumstances, it was arbitrary for the Commission to use Aureon's 2012 rate for purposes of calculating damages for the mid-2013 to 2018 period.

[54] *Liability Order*, ¶ 35.

expressly held and then re-affirmed in the *Reconsideration Order*.[55] Under long-established precedent, the consequence of this finding is that Aureon is *not* insulated from retroactive refunds during the periods from July 1, 2013 to February 28, 2018, when it lacked a valid, deemed lawful tariff.[56]

Nor does the Commission's conclusion that Aureon's 2013 tariff was "void *ab initio*" require the Commission to ignore the serious problems with Aureon's 2012 rate. In the *Liability Order*, the Commission seemed to believe that the deemed lawful doctrine would apply to Aureon's 2013 tariff unless it made a finding that the tariff was void *ab initio*. *See Liability Order*, ¶ 29. But the "deemed lawful" doctrine does not apply to the 2013 tariff for the reasons stated in the *Reconsideration Order* (¶¶ 11-15)—and because, as explained below, the 2013 tariff rate exceeded the applicable benchmark and was thus subject to mandatory detariffing. *See infra* Part III. Determining that Aureon's 2013 tariff was void *ab initio* is by no means inaccurate, but it would be arbitrary for the Commission to rely on that legal fiction to conclude that the 2012 rate—warts and all—must be substituted on a deemed lawful basis, for the 2013 tariff that was *not* deemed lawful. Rather, the Commission should adhere to its initial position in the *Liability Order* and consider the full extent of AT&T's damages from July 1, 2013 to 2018, the period in which Aureon had no deemed lawful tariff and was subject to retroactive refunds.

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[55] *Liability Order*, ¶¶ 29, 35; *Reconsideration Order*, ¶ 11-15.

[56] *See, e.g.*, *AT&T Corp. v. Business Telecom*, 16 FCC Rcd. 12312, ¶ 9-12 (2011) ("The Commission has repeatedly explained its statutory authority to award damages in section 208 complaint cases concerning the lawfulness of tariffed charges"); *Arizona Grocery Co.*, 284 U.S. at 384-85 (when a carrier sets rates, it "necessarily followed that upon a finding of unreasonableness an award of reparation should be measured by the excess paid").

C. Imposition of the 2012 Rate Is Also Improper Because, At A Minimum, The 2012 Rate Had To Be Re-Filed In 2014.

Even assuming, *arguendo*, that the Commission could somehow have concluded that the 2012 rate was appropriate for the period July 1, 2013 to June 30, 2014, there is no way that rate could be justified for periods after July 1, 2014. Under the Commission's rules, Aureon was required to refile its rates in June 2014.[57] Thus, the 2012 rate would have been in effect only for another year at most. It was therefore patently arbitrary to assume that the 2012 rate could have remained the operative rate during the period July 1, 2013 to February 28, 2018.

In the *Reconsideration Order*, the Commission rejected this position, stating that there is "no support" for the claim that Aureon's "failure to comply with Section 69.3 vitiates an operative tariff."[58] The Commission's explanation is off-base. The calculation of damages in these circumstances is an inherently counterfactual inquiry, which requires the Commission to assume—contrary to what actually happened—that the carrier followed the Commission's rules and charged the just and reasonable rate at all relevant times. In that inquiry, the Commission must assume that Aureon complied with the mandatory language of Section 69.3 and filed a new tariff in both 2014 and 2016, and that those tariffs contained rates that complied with the Commission's rate cap regulations at those points in time.

The fatal flaw in the Commission's reasoning is that it is arbitrary and unreasonable to make the predicate assumption, when calculating damages, that Aureon would have violated Section 69.3 (and the *Transformation Order*'s rate cap rules) and left its 2012 tariff on file until 2018. If the Commission assumes that Aureon would have complied with Section 69.3, as it

[57] 47 C.F.R. § 69.3(a), (f)(1).

[58] *Reconsideration Order*, ¶ 18.

should, then the question whether a failure to comply with that rule "vitiates" the 2012 tariff never arises.

The Commission's contrary assumption, here again, deprives AT&T of any reasonable measure of damages. A primary function of a damages award is to make the plaintiff/complainant whole, and to compensate it for the harm caused by the defendant's unlawful conduct.[59] The Commission's *Reconsideration Order* wholly ignores this principle—indeed, it turns it on its head. Under Section 69.3, Aureon was required to refile its cost-of-service rate in both 2014 and 2016. Because the existing evidence shows that the cost-of-service rates in those periods were far below the 2012 rate, the Commission's decision allows Aureon to keep most of the portion of its rates that were unjust and unreasonable, rather than awarding AT&T the "*full* amount of damages."[60]

III. THE COMMISSION SHOULD ALSO EXPLAIN THAT AUREON'S 2013 TARIFF RATE CANNOT BE DEEMED LAWFUL BECAUSE THAT RATE GREATLY EXCEEDS THE CLEC BENCHMARK RATE.

In the *Rate Order*, the Commission has determined that the CLEC benchmark is $0.005694/min. Aureon's 2013 tariff rate of $0.00896/min. greatly exceeded this benchmark rate. Accordingly, the Commission should also explain on further reconsideration that Aureon's 2013 tariff could not have become deemed lawful under Section 204(a)(3) not just because it exceeded the frozen 2011 rate, but also because it exceeded the CLEC benchmark rate. As explained above, the Commission has adopted mandatory detariffing for rates above the CLEC benchmark, and forborne from the tariff filing requirements in the Act—including Section 204(a)(3). In addition to the reasons stated in the *Liability Order* and the *Reconsideration Order*, the fact that Aureon

[59] *Cf.* 47 U.S.C. § 206 (plaintiff "shall" be awarded the "full amount of damages").

[60] *See* 47 U.S.C. § 206 (emphasis added).

could not file a tariff with rates above the CLEC benchmark provides additional grounds as to why its 2013 tariff could not have become deemed lawful.

CONCLUSION

For the foregoing reasons, the Commission should grant reconsideration and determine the "full amount" of AT&T damages, as described above, rather than simply assuming that the 2012 tariff rate is the operative rate for the entire mid-2013 to 2018 period.

Respectfully submitted,

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Dated: August 31, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018 I caused a copy of the foregoing Petition of AT&T Corp. for Further Reconsideration to be served as indicated below to the following:

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